IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 528 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

PATEL VALJI KARSAN

Versus

STATE OF GUJARAT

Appearance:

MR KJ SHETHNA for Petitioners

YF MEHTA, APP, for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

Date of decision: 13/01/97

ORAL JUDGEMENT :- (Per Pandya, J.)

1. Both the accused were facing charge under Section 302 read with Section 34, 323 and 504, both again read with Section 34, all of Indian Penal Code. This they were facing in Sessions Case No.21 of 1988, which concluded on 10.7.1988 by the judgment of the learned

Additional Sessions Judge, Jamnagar, whereby he has held guilty of three offences and awarded life imprisonment for the first with fine of Rs.5000/-, and in default, rigorous imprisonment for two months; for the second offence under Section 323, one month's R.I. and to pay fine of Rs.100/-, and in default, S.I. for 15 days; and for the third offence under Section 504, fine ofRs.100, and in default S.I. for 7 days.

2. The incident leading to the said trial occurred on 3.1.1988 at about 5 P.M. in the sim of village Khad Dhoraji. Deceased Bharatsinh with eye-witness Bhana Bhikha was returning after collecting Ketki plants when the accused came rushing towards them accusing both have pilfered Ketki plants from the field of the accused. The accused started hurling abuses to the deceased and the same later resulted in a scuffle in which accused No.1 gave an axe blow with its reverse side, which landed on the head of the deceased and accused No.2 is said to have given fist blows to the deceased. The said eye-witness picked up the deceased in injured condition, put him in a bullock cart and straightaway took him to Dr. Bhayani at village Nikava, situated nearby to the said village Khad Dhoraji. The elder brother of the deceased was also called. Dr. Bhayani, who was not present originally, came there on being called and when he examined Bharatsinh, he found the condition of Bharatsinh to be critical and, therefore, advised Bahudursinh, brother of the deceased, to take Bharatsinh to Government Hospital, at Rajkot. For the first time the police people, through the hospital people, came to know about the incident, where no names of the accused were disclosed. Later on a detailed complaint came to be filed before Pradyumannagar police station by the said Bahadursinh, where names of both the accused came to be given and from there, the complaint was sent to Kalavad Police Station of Jamnagar by special messenger. This resulted in arrest of the accused and ultimate trial.

3. Before the Trial Court, the said eye-witness has been examined at Ex.9 and Dr. Bhayani has been examined at Ex. 22, P.W. 5, page 109. Based on the fact that the said police information recorded in the form an entry at Ex.46, it was very seriously submitted on behalf of the accused-appellants by the learned Advocate Shri Shethna that as Bharatsinh was in a critical condition, the information in the form of said entry Ex.46 would have come from his brother Bahadursinh only and, if he did not reveal the identity of the assailants while imparting this information to the hospital duty constable, obviously the F.I.R., which has been

subsequently lodged by that very Bahadursinh, as per Ex.45, is the result of an after though and pre-planning. The reason for the submission is that the F.I.R. Ex.45 does contain names of both the accused in no uncertain terms. Initially there was some controversy that the F.I.R. was lodged at 5.15 A.M. on 4.1.1988. Had that been the case, obviously, there has been a much delayed F.I.R. However, on examination, it has been found that the F.I.R. must have been recorded by 9 o' clock on 3.1.1988. It was received by Kalavad Police Station at 5.15 A.M. on 4.1.1988 and, therefore, the said entry is the time of receipt of the First Information as per Ex.45. Ex.46 itself records to the effect that at 9.10 P.M. on 3.1.1988, in serious condition, Bharatsinh was removed from Rajkot Hospital to Ahmedabad. It is, therefore, obvious that, before Bharatsinh was removed from Rajkot, the F.I.R. came to be lodged at Rajkot with the Pradyumannagar Police Station of the city of Rajkot, which ultimately sent to Kalavad Police Station and is at Ex.45. The F.I.R., therefore, in our opinion, is not delayed.

4. No doubt, there is information from the deposition of Dr. Bhayani that he had made his own motorcycle available to Bahadursinh, so that he can go and inform the Police at Nikava. According to Dr. Bhayani, Bahadursinh had gone and came back. However, the prosecution is silent about that aspect.

5. The complainant who lodged the complaint Ex.45 died before his evidence could be record. The First Informant-Bahadursinh, therefore, is not available for deposition. In his absence, the deposition of the said P.W.1, Bhanabhai Bhikhabhai, eye-witness becomes very important. In any case, as per the prosecution, Bahadursinh also had received the knowledge from Bhanabhai Bhikhabhai. Even if Bahadursinh's deposition is taken, the testimony of Bhana Bhikha could have been very important as the F.I.R. is based on the information received by late Bahadursinh from Bhanabhai Bhikhabhai.

6. In no uncertainty he has narrated the incident and in a detailed cross-examination, in our opinion, nothing could be brought out as to weaken the case of the prosecution about the incident. No doubt, there are circumstances which can certainly be pointed out by the defence as infirmity in the prosecution case. First one is the absence of blood from the scene of offence because the medical evidence itself suggests that it was bleeding injury when Bharatsinh was brought at different hospitals. However, in the cross-examination, that

witness-Bhanabhai has stated that he noticed blood oozing out of the injury only for the first time in the bullock cart in which he was carrying the injured when he heard him vomiting. It has, therefore, not been established when injured Bharatsinh was lying at the spot where, according to the prosecution, the incident has taken place, there was, in fact, blood coming out of his nose and ears. Bleeding was from nose and ears because of head injury which in fact was the cause of death. Under the circumstances, bleeding may or may not have started immediately. In our opinion, therefore, it is not of significance at all namely not finding of blood at the spot, and the same will not affect the case of the prosecution.

7. Removal of Ketki is at the root of the entire incident. It has come on record that the field of the accused does have a hedge of this plant. The attempt on the part of the defence was to make out a case that the deceased surreptitiously removed Ketki plant from the field of the accused and, therefore, the incident might have happened. We may state that it is merely a suggestion during the argument and this suggestion was also put to some of the witnesses in their cross-examination. The accused on their part have not taken a categorical stand as to Ketki having been removed from their field either in the cross of the witnesses or in their statement under Section 313 of Code of Criminal Procedure.

8. Nonetheless, there is an indication of the accused having received an injury as certificate came to produced during the cross-examination of the Investigating Officer. The certificate is at Ex.49, where accused No.1 Valji Karsan is shown to have received injury on left elbow joint. It is described as tenderness with contusion and swelling of the size 7 cm x 3 cm. starting with left elbow joint below the elbow. It was obviously an injury caused by hard and blunt substance. Reference to this injury was found in Panchnama at page 203, Ex.40. Witness had not explained this injury and the said eye-witness was put a question about this injury and he could not explain and when a direct question in this regard having been disallowed on earlier occasion, i.e. on 11.1.89, the witness was recalled by application Ex.89 and on 17.1.89, specific question about the injury was asked and he admitted that, he could not explain the injury on the part of the accused.

9. This circumstance coupled with the fact that the

reverse portion of the axe was used does indicate that, if the accused is convicted, i.e. accused No.1, it cannot be said to be an offence of murder. This of course has been the alternative submission on the part of learned Advocate, Shri Shethna. In our opinion, the alternative submission is required to be considered seriously. His earlier attempt to get the accused acquitted on the aforesaid circumstances and other circumstances are of no avail and, therefore, in our opinion, the finding of the learned Trial Judge as to accused No.1 having been involved in the incident will have to be upheld.

10. So far as the offence is concerned, it is obvious that on one hand the injury on the part of the accused is not being explained even by eye-witness, who is the sole important witness in this case and on the other hand when as per his own say it is the reverse portion of the axe which has been used, in our opinion, the intention to kill Bharatsinh cannot be said to have been established. Obviously, therefore, the case will come out of Section 302 and will fall under Section 304, I.P.C. The accused has been in jail ever since his arrest and, therefore, we feel while altering the conviction, so far as the sentence is concerned, whatever he has undergone is sufficient.

11. So far as accused No.2 is concerned, he has nothing to do with the act, which has resulted into the death of Bharatsinh. There is no element of common intention. The conviction under Section 302 is, therefore, set aside. He is acquitted of the charge.

12. For the remaining two offences also, in our opinion, there is hardly any convincing evidence and, therefore, accused-appellant No.2 is acquitted of all the offences and the appeal of accused-appellant No.2 succeeds in total. So far as accused No.1 is concerned, his conviction is maintained, but the one under Section 302 is modified to Section 304 and the sentence undergone so far is held to be sufficient. He is, therefore, ordered to be set at liberty forthwith, if not required for any other purpose. Fine, if paid, by accused No.2 is ordered to be refunded to accused-appellant No.2.

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